

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

No. CV 2:15-0102RSM

Petitioner,

SOFTWARE FINANCE AND TAX
EXECUTIVES COUNCIL, NATIONAL
FOREIGN TRADE COUNCIL,
FINANCIAL EXECUTIVES
INTERNATIONAL, INFORMATION
TECHNOLOGY INDUSTRY COUNCIL,
AND NATIONAL ASSOCIATION OF
MANUFACTURERS' MOTION FOR
LEAVE TO APPEAR AS AMICI CURIAE

MICROSOFT CORPORATION, et al.,

Respondents.

NOTED FOR: NOVEMBER 11, 2016

INTRODUCTION

Pursuant to Rule 7(b), Federal Rules of Civil Procedure, the Software Finance and Tax Executives Council, National Foreign Trade Council, Financial Executives, Information Technology Industry Council and National Association of Manufacturers (together, the “Amici”) move the Court for an order allowing them leave to appear as *amici curiae* and directing the Clerk to file the brief *amici curiae*, which is lodged herewith. Amici seek leave to appear in order to make known to the Court their views regarding the overly broad construction of the term “promotion” in Internal Revenue Code (“Code”) section 7525.

MOTION FOR LEAVE TO APPEAR AMICI CURIAE - 1
Case No. CV 2:15-0102RSM

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1 proposed by the United States in its Response to Microsoft's Brief Regarding Privileged
 2 Documents Still In Dispute, filed with the Court on October 12, 2016. A copy of Amici's
 3 proposed brief is filed together with this motion.
 4

5 Amici represent to the Court that the respondent, Microsoft Corporation, consents to the
 6 grant of Amici's motion for leave to appear. Amici also represent that they have conferred
 7 with counsel for the petitioner, who states it reserves the right to oppose this motion.

8 **I. DISTRICT COURTS HAVE AUTHORITY TO ACCEPT AMICUS BRIEFS**

9 District courts may consider *amicus* briefing from non-parties that addresses "legal
 10 issues that have potential ramifications beyond the parties directly involved" or that presents
 11 "unique information or perspective that can help the court beyond the help that the lawyers for
 12 the parties are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F.
 13 Supp. 2d 1061, 1067 (N.D. Cal. 2005) (quoting *Cobell v. Norton*, 246 F. Supp. 2d 59, 62
 14 (D.D.C. 2003) and *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th
 15 Cir. 1997)). Indeed, the court has "broad discretion" to allow *amicus* briefing and to appoint
 16 *amici curiae*. See *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other
 17 grounds by *Sandin v. Conner*, 515 U.S. 472 (1995); see also *Skokomish Indian Tribe v.*
 18 *Goldmark*, C13-5071JLR, 2013 WL 5720053, at *1 (W.D. Wash. Oct. 21, 2013) ("The court
 19 has 'broad discretion' to appoint *amicus curiae*."); *Nat. Res. Def. Council v. Evans*, 243 F.
 20 Supp. 2d 1046, 1047 (N.D. Cal. 2003) (*amici* "may file briefs and may possibly participate in
 21 oral argument" in district court actions).

22 The role of *amici* is to assist the court "in cases of general public interest by making
 23 suggestions to the court, by providing supplementary assistance to existing counsel, and by
 24

1 insuring a complete and plenary presentation of difficult issues so that the court may reach a
 2 proper decision.” *Newark Branch, N.A.A.C.P. v. Town of Harrison*, N.J., 940 F.2d 792, 808
 3 (3d Cir. 1991). This authority supports the Court’s exercise of its discretion to accept this
 4 *amicus* brief.

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**II. AMICI’S BRIEF WILL HELP THE COURT UNDERSTAND THE NUANCES
 6 OF THE SERVICES THAT TAX ADVISORS ROUTINELY PROVIDE TO
 7 CLIENTS IN THE CONTEXT OF THE TAX SHELTER EXCEPTION IN
 8 CODE SECTION 7525**

9 Amici have reviewed the United States’ Response to Microsoft’s Brief Regarding
 10 Privileged Documents Still In Dispute filed on October 12, 2016. Because this matter
 11 presents very important issues regarding the scope of the tax practitioner privilege in Code
 12 section 7525 that affect Amici’s members, as well as numerous other taxpayers, it is essential
 13 to provide the Court with all of the perspectives on this issue so that it can make an informed
 14 decision. Indeed, in this case, the United States advocates for an interpretation of the term
 15 “promotion” in Code section 7525(b)(2) that is so broad and overreaching that, if accepted, it
 16 would cause a chilling effect and vitiate the open and candid communications that need to
 17 occur so taxpayers can obtain accurate tax advice and be compliant with the numerous,
 18 complicated statutes, regulations, judicial decisions, and administrative guidance that govern
 19 Federal tax. The United States’ advocates an overly broad interpretation of the term
 20 “promotion” as used in Sec. 7525 that is contrary to the congressional intent and sound tax
 21 policy that underlie Code section 7525. Amici believe the Court should use instead a narrower
 22 construction of the term “promotion” found in relevant precedents from the U.S. Tax Court.
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24 The Software Finance and Tax Executives Council (“SoFTEC”) is a trade association
 25 providing software industry-focused public policy advocacy in the areas of tax, finance, and
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1 accounting. The National Foreign Trade Council (“NFTC”) is the oldest U.S. business association
2 dedicated to international tax, trade, and human resource matters. NFTC’s approximately 250
3 members, representing the largest U.S. companies, are advocates of free trade and a rules-based
4 economy. NFTC encourages policies that will expand U.S. exports and enhance the
5 competitiveness of U.S. companies by eliminating major tax inequities in the treatment of U.S.
6 companies operating abroad. Many SoFTEC and NFTC members retain accounting firms upon
7 which they rely for tax advice to best structure and conduct their businesses. Many SoFTEC and
8 NFTC members use cost sharing agreements with foreign subsidiaries and other structures that
9 make the conduct of their businesses overseas more tax efficient.

10 Financial Executives International (“FEI”) is a professional association representing
11 the interests of more than 10,000 chief financial officers and other senior financial executives
12 from over 8,000 major companies in the United States and Canada. The Information
13 Technology Industry Council (“ITI”) represents the interests of the information and
14 communications technology industry, including member companies that are among the global
15 leaders in innovation from all areas in information and communications technology, including
16 hardware, services, and software. The National Association of Manufacturers (“NAM”) is the
17 largest manufacturing association in the United States, representing small and large
18 manufacturers in every industrial sector and in all 50 states. NAM’s mission is to enhance the
19 competitiveness of manufacturers and improve American living standards by shaping a
20 legislative and regulatory environment conducive to U.S. economic growth.

21 The United States’ position impacts whether written communications between Amici’s
22 members and their tax advisors will be protected from disclosure to the government and
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others. If those communications are not protected from disclosure then the members of Amici trade associations may not be able to obtain accurate advice. It is for this reason that Amici seek leave to appear as *amici curiae* so the Court can take their views, as well as the views of numerous similarly situated taxpayers, into account when deciding the proper scope of the tax practitioner privilege.

**III. IF THE COURT ALLOWS AMICI TO FILE THEIR BRIEF THE PARTIES
SHOULD BE GIVEN AN OPPORTUNITY TO RESPOND**

If the Court grants Amici's Motion to participate as *amici curiae* and accepts its brief for filing, the parties should have an adequate opportunity to respond.

1 DATED this 27th day of October, 2016.
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Technology Industry Council, and National
17 *Association of Manufacturers*

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25 ¹ Pursuant to LCR 83.2(a) and Section III(L) of the Electronic Filing Procedures, the attorneys from the
26 McDermott Will & Emery LLP firm are not currently eligible to appear before this Court and are not entering an
appearance at this time.

CERTIFICATE OF SERVICE

I hereby certify that on October 27th, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated this 27th day of October, 2016.

/s/ Michelle Peterson

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